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No. 82-708

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

SUMMA CORPORATION,
Petitioner,

VS.

STATE OF CALIFORNIA ex rel.
STATE LANDS COMMISSION and CITY OF LOS ANGELES,
Respondent.

On Writ of Certiorari to the Supreme Court of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation moves this Court for permission to file the annexed amicus curiae brief in support of petitioner, Summa Corporation. Petitioner, Summa Corporation, and respondent, State of California, have withheld consent.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized and existing under the laws of California for the purpose of engaging in litigation in matters affecting the public interest. Many of Pacific Legal

Foundation's members, contributors, and supporters have expressed concern regarding the changing and expansive application of the public trust doctrine by the State of California which results in injury to the private property rights of citizens. In order to voice these interests, the Board of Trustees of Pacific Legal Foundation, the majority of whom are attorneys, has authorized the filing of this brief.

Because the interests of petitioner focus mainly upon the federal issues involving the Equal Footing Doctrine and the finality of patents over Mexican land grants certified by the United States, Pacific Legal Foundation believes that the state's invocation of the public trust doctrine as an extension of the state's expansion of public interests over private property rights could receive inadequate attention from the parties. Whether the state may recast the character and use of private property so as to facilitate and implement the taking of private property without the necessity of having to pay for the value received is an issue which deserves briefing from as many viewpoints as possible. The increasing economic constraints upon state and local governments make the invocation and use of the public trust doctrine, implied dedications, prescriptive easements, as well as regulatory schemes, the methods for securing "public" control over valuable real property. The private property rights of innocent citizens lie in the balance. Pacific Legal Foundation believes that its position, in support of private property rights, has broad public support, and that its public policy perspective will allow it to provide the Court with a more thorough briefing of the interests at stake in this litigation. Pacific Legal Foundation has filed

amicus briefs in *San Diego Gas & Electric Company v. San Diego*, 450 U.S. 621 (1981); *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, *cert. denied sub nom. Lyon v. California*, 454 U.S. 865 (1981); *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, *cert. denied*, 454 U.S. 865 (1981).

For the foregoing reasons, Pacific Legal Foundation requests that this motion to file the annexed amicus curiae brief be granted.

Respectfully submitted,

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER SUMMA CORPORATION

INTEREST OF AMICUS

The interest of amicus is set forth in the preceding motion for leave to file this brief.

OPINION BELOW

The opinion of the California Supreme Court is reported at *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal. 3d 288 (1982).

STATEMENT OF THE CASE

Amicus curiae, Pacific Legal Foundation, adopts the statement of the case set forth by petitioner.

SUMMARY OF THE ARGUMENT

The California Supreme Court committed a taking of private property without payment of just compensation through invocation of the public trust doctrine over land never previously held by the state and confirmed to citizens under federal patent. The state may not look to the establishment of trust interests in order to circumvent the need to pay for the social planning of today. The decision of the California Supreme Court should therefore be reversed.

ARGUMENT

I

THE JUDICIAL BRANCH OF THE STATE GOVERNMENT HAS COMMITTED A TAKING OF PRIVATE PROPERTY WITHOUT PAYMENT OF JUST COMPENSATION

By way of its ruling, the state court has decided that the public trust doctrine is applicable to land never held by the state or federal government. *City of Los Angeles v. Venice Peninsula Properties,* 31 Cal. 3d 288, 291 (1982). Such a decision is a change in California property law and deprives petitioner of land held in fee since before California became a state.

The state court's expansion of the public trust doctrine is similar to the Washington Supreme Court's construction of the state constitution in *Hughes v. Washington,* 389 U.S. 290 (1967). In *Hughes,* the state court had ruled that title to accretion upon petitioners' oceanfront land vested in the state rather than in the abutting landowner. The United States Supreme Court reversed and in a concurring opinion by Justice Stewart it was stated that the state

court's decision had effected an unconstitutional taking. *Id.* at 297-98.

As with Mrs. Hughes, petitioner herein had every reason to regard its property as its own, free of any claim by the public. Prior to the state court's decision, no legal or factual authority existed to support the state's claim of ownership. While the public trust doctrine is of ancient vintage, no prior application to lands such as petitioner's had ever been subject thereto. The state court itself recognized that it was creating new law in applying the public trust doctrine to land never owned by the state. *City of Los Angeles,* 31 Cal. 3d at 296.

In its opinion the Court stated the primary issue of the case to be "whether defendants' property is subject to the public trust" and then proceeded at full tilt to the conclusion that, because mineral rights were not included in Mexican land grants, "[t]he same reasoning should apply to tidelands." *Id.* at 298. This strained logic equates to the creation of a new construction of the public trust doctrine and as in *Hughes* achieved the same result as a taking by eminent domain "by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so." *Id.* at 298. "[A] State, by ipse dixit, may not transform private property into public property without compensation . . . ." *Webbs' Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 164 (1980). Neither the California Legislature by statute, nor the California courts by judicial decree, may suddenly, unexpectedly, and retroactively recharacterize the ownership of property without the payment of just compensation. "This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent." *Id.*

II

THE STATE COURT'S REFUSAL TO GIVE RES JUDICATA EFFECT TO THE FEDERAL PATENT IS SO FUNDAMENTALLY UNFAIR AS TO DEPRIVE PETITIONER OF DUE PROCESS OF THE LAW

The further impact of the state court's decision is to fail to give res judicata effect to the title confirmed in and patented to the Mexican grantees by the United States pursuant to the treaty of Guadalupe Hidalgo (9 Stat. 922 (1848)) and the Act of March 3, 1851, "to ascertain and settle the private Land Claims in the State of California" (9 Stat. 631 (1851)). This failure can be termed a transgression of the Due Process Clause of the United States Constitution.

The state court's ignoring of the federal patent determinations deprives petitioner of its right to rely upon the protections afforded by the doctrine of res judicata thereby exposing petitioner's vested rights to the ever changing whims of public policy as espoused by state courts. "Where the refusal of a state court to apply res judicata results in the direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge the Owners' constitutional right to due process of law." *Sotomura v. County of Hawaii*, 460 F. Supp. 473, 482 (D. Hawaii 1978), *appeal dismissed on other grounds*. The interests of the state to effectuate public policy concerns do not justify the deprivation and abridgment of the right.

Examples of the extremes to which state courts will go to effect a transformation of private property into public property, in support of changing public policy concerns, can be found in two cases out of the Hawaii District Court.

In *Sotomura, supra,* the State of Hawaii had recognized, for many years, the location of the seaward boundary to be as described in the judgment confirming registered land, usually the mean high water mark. In an eminent domain proceeding the trial court found the seaward boundary to be the upper reaches of the wash of the waves as evidenced by the line of debris on the shore. On appeal the Hawaii Supreme Court went beyond the trial court decision and decided the seaward boundary to be at the vegetation line, substantially reducing the size of the parcels involved in the litigation. In an action brought in the Federal District Court for constitutional deprivations, the court concluded that the Hawaii Supreme Court, in its decision, had effectuated a "taking" in violation of the Fifth and Fourteenth Amendments. The District Court decision turned, in part, upon the Supreme Court's ignoring of the judgments confirming the registered status of the land.

In *Robinson v. Ariyoshi,* 441 F. Supp. 559 (D. Hawaii 1977), the state court was asked to settle a water dispute. Prior established law gave the water rights into private ownership. The state court summarily concluded that the water rights were held by the state for the benefit of the public. This sudden change in property law was determined to be a "taking" under the Fifth Amendment by the District Court for Hawaii.

Recognition is given to the state's right to define, develop, and administer the law of real property, but the state's right to change the law must be measured against the citizen's rights affected. The District Court, in both cases, recognized the new interpretations of state law to be denials of

due process as failing to follow previously well established property law.

A similar denial of due process is set forth in the re-characterization of real property law stated by the California Supreme Court. Based upon previously settled law, petitioner and those in the same class as petitioner have spent millions developing, improving, paying taxes upon, conveying, and otherwise exercising all the powers of ownership over eight and one-half million acres of property. Their exercise of property rights appeared, for more than 100 years, to be settled per the 1851 patent, confirming same. Since statehood the Legislature always possessed the right to affect the property rights attached to ownership but the Legislature would be compelled to pay compensation for any expropriation. Expropriation by judicial decision is no less a taking than when accomplished by legislative fiat. "No more can private property be so taken away by judicial decision and handed over, gratis, to the State. 'The touchstone of due process is the protection of the individual against arbitrary action of the government.' *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2976, 41 L.Ed.2d 935." *Id.* at 585.

The extent of the property rights involved were settled at the time of confirmation by patent in 1851. The state's imposition of the public trust doctrine over such property ignores the res judicata effect of the patent proceedings thereby dramatically altering the ownership rights in the property as well as denying petitioner's due process.

III

THE STATE COURT IS MOVING TO CREATE A NEW DOCTRINE OF REAL PROPERTY LAW UNDER THE LABEL OF THE PUBLIC TRUST DOCTRINE

If a state is permitted to alter property law to include these land grants as within the public trust doctrine, the end result will only be an unimpeded continuation of the state's use of the judiciary to accomplish what the Legislature and financial realities could not do: the taking of property without just compensation. It is not difficult to foresee that the state can and will characterize almost any property possessed of water to be within the trust. Without parameters placed upon the use of what once was a limited doctrine, the state, in times of fiscal constraints, will but use the state judiciary to accomplish public projects that the public coffers cannot support.

Commencing with *Marks v. Whitney,* 6 Cal. 3d 251 (1971), the state court began to realize the potential for expansion upon this ancient doctrine. In *Marks* the scope of the public's right in tidelands was broadened to include the right to hunt, bathe, or swim and the right to preserve tidelands in their natural state for scientific study. *Id.* at 259-60.

More recently, the state's high court has begun to give new interpretation to the doctrine, so as to maximize the state's ownership of what was previously privately owned property. In pursuit of this end the state court in *City of Berkeley v. Superior Court,* 26 Cal. 3d 515 (1980), overturned existing state law in order to confirm the state's interest. Once the court had permitted itself the full discretion to pass upon the state's interest in such property

rights it appeared to have found itself breaking new ground and gathering a sense of euphoria in its excitement over the potential for further expansion of the public trust doctrine. The court was not satisfied simply to resurrect or rediscover the trust; it focused its most creative efforts toward embellishing upon and expanding the doctrine to include beds of nontidal, navigable waters. *State of California v. Superior Court (Lyon)*, 29 Cal. 3d 210, *cert. denied sub nom. Lyon v. California*, 454 U.S. 865 (1981); and *State of California v. Superior Court (Fogerty)*, 29 Cal. 3d 240, *cert. denied*, 454 U.S. 865 (1981). A fuller appreciation for the direction of what the state court had wrought can be read in the decision of *National Audubon Society v. Superior Court of Alpine County*, 33 Cal. 3d 419 (1983), in which the state not only makes claim to navigable waters but also applies the authority to "waters tributary" so as to prevent any claim of "vested right to divert waters once it becomes clear that such diversions harm the interests protected by the public trust." *Id.* at 425-26.

As can be seen from a reading of the foregoing cases, the state court's ever broadening interpretation of a heretofore very limited doctrine has created a mutation. The state court's effort to impose the doctrine on land never held by the state demonstrates a further change in the character of the original doctrine.

CONCLUSION

The state court's decision constitutes a change in the property law of the state. At no time prior has state law granted to the state the right to assert the public trust doctrine over the real property never held by the state and conveyed as Mexican land grants confirmed by federal patent. The judiciary should not be permitted to accomplish what the Legislature may not do without payment of just compensation.

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